No. 15,523

United States Court of Appeals

For the Ninth Circuit

DANIEL L. ABDUL,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court for the District of Hawaii.

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

This brief is written in reply to Appellee's Answering Brief, a printed copy of which was received through the mail on November 27, 1957. Appellant will not reply herein to the argument of Appellee on each and every specification of error, but this is not to be construed as a waiver of any specification on which no further argument is offered.

REPLY TO APPELLEE'S STATEMENT OF THE CASE.

Appellee complains that Appellant has designated portions of the record which will place him "in the

most favorable light in this Court", and that this placed Appellee "in somewhat of a dilemma" as to what Appellant's purpose was and as to what additional portions should be designated (Appellee's Brief, 3). It is regrettable that Appellee was confronted with such a momentous problem, for it had been assumed that the purpose was obvious. Portions of the record which were felt to reflect the Appellant's *bona fides* were designated so there could be no question that a substantial issue on this point had been raised in the evidence. Were this not the case there would have been no basis for the instructions requested by Appellant on the subject of "wilfulness" nor for his objections to the instructions given defining that term as used in the misdemeanor counts of the indictment. *United States v. Phillips,* 7th Cir., 1954, 217 F. 2d 435, 442.

Appellee further complains that after it had filed a counter-designation, designed to show that "the returns were filed under duress and the taxes were collected by distraint after a great deal of effort", Appellant filed a further designation. Appellee expresses the fear that the process of designating portions of the record could go on *"ad infinitum"* (Appellee's Brief, 4). It is submitted that speculation of this sort should not be made a part of an appellate brief. There were no further designations, and the process could not be continued indefinitely as it is necessarily limited by the bounds of the record. The additional designation was made by Appellant to show that evidence bearing on the issue of Appellant's good faith was

also adduced through the only witness whose testimony had been designated in part by the Appellee.

Appellee argues that Appellant "makes no point of the sufficiency of the evidence" (Appellant's Brief, 3) and then, paradoxically, presents its statement of the case which it says supports its conclusion that Appellant is "an extremely dishonest and unscrupulous man" (Appellee's Brief, 5-8, 4).

Appellee posits this characterization of Appellant in part on its Requested Instruction No. 8 (R. 22-23) which it states "was refused solely on the ground that the Court declined to comment on the evidence" (Appellee's Brief, 5). In fact, the Court ruled on this point as follows:

> "I will not give Instruction Number 8 at all. I have not made it a practice in the past to comment on the evidence and may not in the future, *but if I am going to comment on the evidence, I am going to do it by way of summarizing both sides and not concentrating on one side or the other. I want to be fair."* (R. 240-241. Emphasis added.)

This language indicates that the court recognized an issue of *bona fides* had been raised by the evidence.

It is to be noted that in that portion of its statement of the case appearing on pages 5 and 6 of its Brief Appellee has not referred to any pages of the record in support of the statements made. There are two statements which are clearly inaccurate. It is said that his bookkeeper advised him "that he could file the returns without payment although a penalty would

ensue, . . . " The entire testimony of the bookkeeper was printed (R. 54-173). Nowhere does it appear that the bookkeeper warned Appellant that "a penalty would ensue". It is further said that the taxes in each instance were eventually collected "through distraint". What eventually happened was that Appellant had to close his business through an auction to raise sufficient money to pay the balance of the taxes due, and that although a levy was prepared (Exhibit A) an agreement was entered into with Appellant whereby he paid over 80% of the monies collected at the auction to the Internal Revenue Service (R. 180, 185-186). The evidence establishes beyond any doubt that Appellant had made substantial payments in the amount of $8,802.88 on withholding and F.I.C.A. tax liabilities for the period from October 1, 1953, through June 30, 1955, before the auction was held. The total amount due for this period was $17,-489.93 (Exhibit 21).

Appellant is unable to understand how Appellee computed that $82,784.00 accrued to the benefit of his wife and himself during the six quarters covered by the indictment (Appellee's Brief, 7). It is true that his individual income tax returns reflect that he and his wife earned $2400.00 per month from the business which would make a total of $43,200.00 for the six quarters involved, but it is also true that these checks were frequently not cashed due to shortage of funds (R. 131). In addition, his borrowings from the company approximated $1900.00 during the year 1954 (Exhibit 28). Not having Exhibit H or 28 at this

time, Appellant is unable to determine his net borrowings from the company, if any, during the last quarter of 1953 and the first two quarters of 1955.

ARGUMENT.

SPECIFICATION OF ERROR NO. I.

THE COURT ERRED IN INSTRUCTING THE JURY AS IT DID ON THE MEANING OF "WILFUL".

It is to be noted that, though Appellee has quoted the Supreme Court's general definition in *United States v. Murdock,* 1933, 290 U.S. 389, 394, of "wilfully" when used in a criminal statute, Appellee has chosen to ignore the balance of the definition given by the Supreme Court in that case to the effect that the term "wilfully" makes "evil motive a constituent element of the crime" when the crime charged is, as in the instant case, a misdemeanor violation of the taxing statutes. Appellee then leaps to *Spies v. United States,* 1943, 317 U.S. 492, 497, 498, which involved a violation (felony) of Section 145(b) of the Internal Revenue Code of 1939, and quoted a portion of some *obiter dictum* given by the Court on the subject of what "wilfully" means. Once again the *full* comment of the Court on the subject must result in a different conclusion from that drawn by Appellee.

> "The difference between willful failure to pay a tax when due, which is made a misdemeanor, and willful attempt to defeat and evade one, which is made a felony, is not easy to detect or define. *Both must be willful,* and willful as we have said, is a word of many meanings, its construction often

being influenced by its context. *United States v. Murdock,* 290 U.S. 389. It *may* well mean something more as applied to nonpayment of a tax than when applied to failure to make a return. More voluntary and purposeful, as distinguished from accidental omission to make a timely return *might* meet the test of willfulness. *But in view of our traditional aversion to imprisonment for debt, we would not without the clearest manifestation of Congressional intent assume that mere knowing and intentional default in payment of a tax, where there had been no willful failure to disclose the liability is intended to constitute a criminal offense of any degree. We would expect willfulness in such a case to include some element of evil motive and want of justification in view of all the financial circumstances of the taxpayer."* (Emphasis added.)

Appellee can gain small comfort from the definition given by the Court in *Kellems v. United States,* D. C. Conn. 1951, 97 F. Supp. 681, 682, of the term "wilful" as used in the civil penalty statute. It is submitted that the answer to this authority cited by Appellee is the case of *Paddock v. Siemoneit,* Tex., 1953, 218 S.W. 2d 428, 7 A.L.R. 2d 1062, 1071, wherein the Court distinguished between the meanings of the term "wilfulness" as used in tax statutes imposing criminal penalties and tax statutes imposing civil penalties.

The vice of the District Court's Instructions on the subject of "wilfulness" as pointed out in Appellant's Opening Brief lay in its drawing a sharp and repeated distinction between the meaning of the term as used in the felony counts and as used in the misdemeanor

counts, and in requiring "bad purpose" only as an *alternative* element of "wilfulness". The instructions do not meet the requirements of the *Murdock* case which makes "bad faith or evil intent" an essential element of the offense.

It is submitted that the portions of the record which have been printed show that an issue as to the *bona fides* of Appellant had been raised which should have been submitted to the Jury by appropriate instructions. *United States v. Phillips,* supra; *United States v. Raub,* 7th Cir. 1949, 177 F. 2d 312, 316; *Tatum v. United States,* U.S. App. D.C. 1950, 190 F. 2d 612, 617. In the *Tatum* case the Court held:

> " . . . in criminal cases the defendant is entitled to have presented instructions relating to a theory of defense for which there is any foundation in the evidence, even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility. He is entitled to have such instructions even though the sole testimony in support of the defense is his own."

The good faith defense of the Appellant to the charge that he wilfully committed the offenses charged is based on evidence (1) that the company lacked funds with which to pay the taxes when due (R. 80, 84, 111); (2) that he thought and was advised by his accountant that the taxes must be paid together with the return (R. 132-133); (3) that his books which were available to Internal Revenue Service agents, always accurately reflected his tax liability (R. 121-122, 166); and (4) that he always intended to pay the taxes, and did (Exhibit 21) when he was able to raise

sufficient funds (R. 196-197). Appellant did not tell the truth when he advised the Internal Revenue Service collectors who were hounding him for payment that he had sent in the returns, but this presents no paradox as far as the issue of good faith is concerned; he was simply trying to gain time to raise money to pay the taxes which were due (R. 196-197). It must be remembered that his company was in such dire financial straits that even though he kept close tab on the bank balance payroll checks occasionally bounced (R. 171).

Appellant has never contended that the taxes due did not constitute a debt to the Government, nor has he contended that the lack of money with which to pay the taxes was a "legal excuse" for failing to file the return on time. It is his contention that the evidence outlined above was evidence of good faith as distinguished from bad faith or evil intent which the Court held in the *Murdock* case is an essential element of the offense. It is further his contention that this issue was never presented to the jury because of the District Court's failure to instruct that bad faith or evil intent must be established beyond a reasonable doubt to return a verdict of guilty on the misdemeanor counts.

Appellant accepts the proposition stated in *Forster v. United States,* 237 F. 2d 617, 621, that "instructions on wilfulness need not be stated in seven different ways, each an invitation to acquit", provided that each instruction given on the subject is a correct statement of the law and with reference to the subject of wilfulness requires a finding of bad faith or

evil intent. This finding was not required by the Court's instructions on the misdemeanor counts; the matter was brought to the Court's attention through the instructions requested by Appellant and arguments presented at the time the instructions were settled. Even if no instructions on the matter, or instructions which were not entirely correct statements of the law, had been requested by Appellant it was the Court's duty to give a correct instruction defining the term "wilfully" as used in the misdemeanor counts. *Carrado v. United States,* U.S.C.A. D.C. 1953, 210 F. 2d 712, 722, cert. den. 347 U.S. 1018; *Marson v. United States,* 6th Cir. 1953, 203 F. 2d 904, 912; *McQuaid v. United States,* U.S.C.A. D.C. 1951, 193 F. 2d 696, 697, cert. den. 344 U.S. 929; *Morris v. United States,* 156 F. 2d 525, 169 A.L.R. 305; *Colbert v. United States,* U.S.C.A. D.C. 1944, 146 F. 2d 10; *Williams v. United States,* U.S.C.A. D.C. 1942, 131 F. 2d 21, 23.

In the *Marson* case it is stated at p. 912 as follows:

> "With respect to a charge on the theory relied upon, it is the law that where a defendant in a criminal case presents a theory supported by the evidence and the court's attention is particularly directed to it, it is reversible error to refuse to give a charge on such a theory."

and in the *Colbert* case at page 12:

> " . . . where the judge elects to charge in his own language on all matters properly to be considered by the jury, the failure of a requested instruction to conform precisely to the law, should not relieve the court of the duty to charge accurately upon an important phase of the evidence."

SPECIFICATION OF ERROR NO. II.

THE COURT ERRED IN GIVING GOVERNMENT'S REQUESTED INSTRUCTION NUMBER 22 TO THE JURY.

Appellant objected to Government's Requested Instruction No. 22 on the ground that it was "more in the nature of comments and conclusions" rather than an instruction on the law (R. 252). Perhaps the objection could have been more artfully phrased, but it should have been sufficient to give fair warning that the proffered instruction was not of the type customarily given. In any event, as an erroneous charge prejudicial to the Appellant this Court may review it. *Block v. United States,* 9th Cir. 1955, 221 F. 2d 786, 788.

An examination of the record reflects that Instruction No. 22 was not so comfortably cushioned or lost between instructions to acquit as Appellee suggests. It is immediately preceded by an instruction that prior investigations to determine civil tax liability are no bar to criminal prosecution, and that instruction is preceded by one that it is not incumbent upon the Government to prove the defendant guilty beyond all possibility of doubt (R. 278). It is followed by a lengthy instruction on the subject of evidence of good and bad character (R. 278-280). In fact, this instruction was particularly prejudicial because of its position in the order of instructions.

The case of *United States v. Link,* 3d Cir. 1952, 202 F. 2d 592, is good authority for Appellant's contention that Instruction No. 22 as given is reversible error. The closing lines of the instruction complained

of in that case, to-wit: "The people of the United States are entitled to be assured of conviction.", are but a short step removed from the last portion of Instruction No. 22 that " . . . unless you do your duty you might just as well strike the laws off the statute books." This suggestion of the Court rings with warnings of anarchy and is a call to convict.

The words of caution contained in *Starr v. United States,* 1894, 153 U. S. 614 at 626 are in point:

> "It is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or intimation is received with deference, and may prove controlling."

SPECIFICATION OF ERROR NO. III.

THE COURT ERRED IN REFUSING TO STRIKE THE WITNESS WALKER'S TESTIMONY.

> "It is fundamental that evidence to be admissible must relate and be confined to the matter or matters in issue in the case at bar and must tend to prove or disprove these matters or be pertinent thereto, or, to put it another way, proof must correspond to the issues raised by the pleadings."
>
> 20 Am. Jur. 242, § 248.

The authorities cited by Appellee on this specification do not provide an answer. *Peoples Loan & Investment Co. v. Travelers Ins. Co.,* 8th Cir. 1945, 151 F. 2d 437, was an action to recover on a double indemnity provision for accidental death of insured—he was

shot—in an encounter with a police officer. Evidence was admitted of insured's prior expressions of hostility to police officers and of prior incidents he had had with them. Here the Court found that insured's expressions of direct animosity against the police was admissible under a special Arkansas rule on the subject of proof of self-defense, and that they were neither too remote nor prejudicial. The Court pointed out that there is no error "where the evidence is not such as is clearly apt to confuse a jury's mind or prejudice its judgment."

In *Gordon v. United States,* 6th Cir. 1947, 164 F. 2d 855, a conspiracy charge, evidence was admitted of defendant's complicity in other crimes which related closely on the history of the conspiracy. The Court held its admission was proper stating " . . . it tended to throw light upon facts and conduct in issue." *Clune v. United States,* 1895, 159 U.S. 590, relates to a conspiracy to obstruct the mails. Certain cables (one from Eugene V. Debs) concerning the stopping of trains were received in evidence. The Supreme Court found that these cables tended to show the existence of the conspiracy.

How different is the instant case? Assuming the truth of the statement attributed to Appellant by the witness Walker, it does not reflect anything more than an intention to get a "dead beat" to pay his obligations probably so that Appellant would have some money to pay the taxes which were due from his company. If Walker had said he was heavily indebted to a bank, Appellant would undoubtedly have made the same reply using the name of the bank instead of "Uncle

Sammy", but the irrelevance of and the prejudice in the statement attributed to him is readily apparent.

CONCLUSION.

It is again respectfully urged that the judgment appealed from herein should be reversed.

Dated, Honolulu, T. H.,
December 12, 1957.

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